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THE UNITED STATES DISTRICT COURT
FOR THE CENTRAL DISTRICT OF CALIFORNIA

Anthony Pompliano,

plaintiff,

v.

Snap Inc., d.b.a. Snapchat, *et al.*,

defendants.

Case No. 2:17–cv–3664 DMG (JPRx)
Hon. Dolly M. Gee

Plaintiff Anthony Pompliano's Opposition to Motion to Compel Arbitration

Date: July 14, 2017
Time: 9:30 a.m.
Crtrm: 8C
Judge: Hon. Dolly M. Gee

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I. INTRODUCTION

The Court should deny defendants' motion to compel arbitration because the arbitration agreement at issue here (including the delegation clause which provides that the arbitrator must decide issues of arbitrability) is unenforceable as an adhesion contract that is substantively unconscionable. In this regard, defendants' opening paragraph makes Pompliano's case for him: "As part of [Pompliano's] employment negotiation, Snap bargained for and Pompliano signed an arbitration agreement." (Mot. at p. 5.) That statement is accurate: Snap Inc., a billion-dollar company, did all the bargaining; Pompliano signed. Snap Inc., in conjunction with in-house attorneys, dictated the terms of the arbitration agreement as a condition of Pompliano's employment. They told him that if he wanted to work for Snap Inc., he had to sign the arbitration agreement (which relegates all of his claims to arbitration) and an assignment agreement (which allows defendants to sue Pompliano in court). And he had to return the signed documents to Snap Inc. the same day.

The arbitration agreement is a contract of adhesion (i.e., procedurally unconscionable): Pompliano had no legal training, no experience negotiating written employment or arbitration agreements, and no understanding of the rights he was signing away (nor would a reasonable person in his position). By purporting to require Pompliano to arbitrate all of his claims against defendants (and have the issue of arbitrability decided by an arbitrator) while allowing defendants to pursue claims against Pompliano in court (where the issue of arbitrability would not even arise), the arbitration and assignment agreements are so one-sided in Snap Inc.'s favor and non-mutual that they are substantively unconscionable. Furthermore, the arbitration agreement, including the delega-

tion clause, is ambiguous and uncertain in that it fails to show both parties' clear and unmistakable intent to submit Pompliano's claims to arbitration and have an arbitrator determine the issue of arbitrability. Accordingly, the delegation clause (and the arbitration agreement as a whole) is unenforceable.

In addition, many of Pompliano's claims are not subject to the arbitration agreement by its own terms. For example, Pompliano's claim for injunctive relief pursuant to California Labor Code § 1050 falls outside the scope of the arbitration agreement, which permits Pompliano to seek provisional relief in court. Finally, Pompliano's whistleblower claims and related claims cannot be arbitrated, as they are subject to the anti-arbitration provision of the Sarbanes–Oxley Act, from which the whistleblower claims arise.

II. PROCEDURAL HISTORY

Plaintiff Anthony Pompliano filed a statement of claims in arbitration on July 27, 2016, in JAMS against Snap Inc. (formerly Snapchat, Inc.)[1] and its officers Evan Spiegel, Brian Theisen, and Imran Khan. (Sergenian Decl. ¶ 2; Ex. A.) The Honorable Rex Heeseman (Ret.) is presiding over the arbitration. (Sergenian Decl. ¶ 2.) The claims in arbitration are for: (1) wrongful termination in violation of public policy; (2) fraudulent inducement of employment contract (Cal. Labor Code § 970); (3) breach of contract; (4) breach of the covenant of good faith and fair dealing; (5) intentional infliction of emotional distress; and (6) violation of California Labor Code § 201, *et seq.* (Ex. A.)

Subsequently, on November 8, 2016, Pompliano's counsel requested

[1] The names "Snapchat" and "Snap Inc." are used interchangeably in this brief.

Pompliano's employment records from Snap Inc. pursuant to California Labor Code §§ 226(b), 432, and 1198.5(a). (Sergenian Decl. ¶ 4; Ex. B.) To date, Snap Inc. has refused to provide Pompliano's employment records pursuant to that request.[2]

On November 18, 2016, Judge Heeseman set the arbitration hearing for September 11–19, 2017. (Sergenian Decl. ¶ 6; Ex. D.)

Pompliano filed a state court action on January 4, 2017, against Snap Inc., Los Angeles Superior Court Case No. BC 645641. (Sergenian Decl. ¶ 7; Ex. E.) The state court complaint consists of a single claim for misrepresentation preventing a former employee from obtaining employment under California Labor Code § 1050, *et seq*. (*Id.*)

In response to the complaint, on January 18, 2017, Snap Inc. filed two motions in state court: (1) a petition to compel arbitration; and (2) a motion to seal portions of complaint. (Sergenian Decl. ¶ 8; Ex. F, G.) Snap Inc. set the motion to seal portions of the complaint for hearing on April 17, 2017 (Ex. G); however, even though presumably there were earlier dates available, Snap Inc. set the petition to compel arbitration to be heard nine months later, September 22, 2017, which conveniently would take place the week after the arbitration was scheduled to conclude. (Ex. F.)

Although the arbitration was initiated almost one year ago, none of

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[2] Snap Inc's counsel claims that Pompliano's employment records were produced to his prior counsel at some unspecified date. (*See* Sergenian Decl. ¶ 5; Ex. C at p. 2 ("You also asked about a request in the arbitration by Mr. Pompliano for employment documents. Regarding that, we responded last year, including providing Mr. Pompliano's personnel file documents.").) However, after Pompliano's counsel pointed out that the employment file did not appear in the case file, and asked Snap Inc.'s counsel to identify when the file was produced and to provide a copy of the records, Snap Inc.'s counsel ignored the request. (Ex. C at p. 1.)

the parties have availed themselves of the arbitration forum in any substantive way. Pompliano served document demands on Snap Inc. on January 25, 2017. (Sergenian Decl. ¶ 9; Ex. H.) In its response, served on March 1, 2017, Snap Inc. refused to produce any documents in the arbitration. (Sergenian Decl. ¶ 9; Ex. I.) There has been no exchange of documents, no other written discovery, and no depositions have been taken or scheduled. (Sergenian Decl. ¶ 9.) Accordingly, defendants' statement that "[t]he arbitration proceeding [Pompliano] initiated is still being litigated" (Lee Dec. ¶ 8) is misleading because no substantive proceedings have occurred in arbitration to date.

A case management conference in the state court action was held in chambers on May 4, 2017, before the Honorable Richard E. Rico. (Sergenian Decl. ¶ 10.) Contrary to Snap Inc.'s assertion, Judge Rico did not "reject[ ] Plaintiff's request to conduct discovery prior to the September 22 petition hearing." (Lee Decl. ¶ 7.) To the contrary, the court and counsel discussed the hearing on Snap Inc.'s petition to compel arbitration, and the court urged Snap Inc. to reschedule the hearing on the petition on an earlier date, which it declined to do. Snap Inc. has not moved to stay discovery pending a decision on the petition to compel arbitration. (Sergenian Decl. ¶ 10.)

This action was filed on May 16, 2017, against Snap Inc., Spiegel, Theisen, and Khan. (Sergenian Decl. ¶ 11.) In addition to asserting the six causes of action previously asserted in arbitration and the cause of action asserted in state court, the complaint also asserts causes of action for violation of the Dodd–Frank whistleblower statute (15 U.S.C. § 78u-6), and violation of California's whistleblower statute (Cal. Labor Code § 1102.5). (Dkt. #1.)

Pompliano voluntarily dismissed the state court action without prejudice on May 26, 2017. (Sergenian Decl. ¶ 12; Ex. J.)

III. FACTUAL BACKGROUND

Pompliano is a 2011 graduate of Bucknell University, where he majored in sociology and economics. (Pompliano Decl. ¶ 2.) Pompliano is not an attorney, and he holds no professional licenses. (Pompliano Decl. ¶ 3) Prior to and during his employment with Snap Inc., Pompliano had no experience negotiating written employment or arbitration agreements. (Pompliano Decl. ¶ 4)

Pompliano was hired by Facebook in 2014. At Facebook, where he received rave performance reviews, he led the Growth & Engagement initiatives for Facebook Pages. (Pompliano Decl. ¶ 5.)

In July 2015, Snap Inc. aggressively recruited Pompliano. After several telephonic interviews, Snapchat flew Pompliano from his home in Northern California to Los Angeles on Sunday, August 9, 2015. The next day, Monday, August 10, 2015, he met with some of Snapchat's most senior executives at Snapchat's headquarters in Venice, California, including defendants Khan and Theisen. Pompliano flew back to Northern California at the end of the day. (Pompliano Decl. ¶¶ 6–8.)

The next day, Tuesday, August 11, 2015, Snapchat's in-house recruiter called Pompliano to inform him that Snapchat CEO Evan Spiegel wanted him to fly back down to Los Angeles the next day to meet with him. Pompliano explained that he had just flown down the day before, and that flying down for full day meetings twice in one week would be difficult because he would have to take an additional day off work without any notice. The recruiter insisted it was urgent that he come back to meet with Spiegel. Pompliano agreed to fly back to Snapchat's offices the next day. (Pompliano Decl. ¶ 9.)

On Wednesday, August 12, 2015, Pompliano met with several Snapchat executives in Los Angeles, including Spiegel, Khan, and Theisen. (Pompliano Decl. ¶ 10.)

The next morning, Thursday, August 13, 2015, Khan called Pompliano. He wanted to know what Pompliano was earning at Facebook, and what it would take to convince him to leave Facebook and join Snapchat. Pompliano provided his current salary and stock options at Facebook, and Khan replied that Snapchat would be in touch shortly. (Pompliano Decl. ¶ 11.)

The following morning, on Friday, August 14, 2015, Theisen called Pompliano and offered him a position at Snapchat. After some back-and-forth about Pompliano's salary, they agreed on a number. (Pompliano Decl. ¶ 12.)

Later that same day, Snapchat emailed Pompliano a formal offer letter, along with a Confidential Information and Inventions Assignment Agreement (the "Assignment Agreement") and an Arbitration Agreement as attachments. (Pompliano Decl. ¶ 13; Ex. 1, 2, 3.) The offer letter states: "To protect the interests of both Snapchat and its clients, all employees are required to read and sign the enclosed Confidential Information and Inventions Assignment Agreement as a condition of employment at Snapchat." (Ex. 1 at p. 2.) It further states: "Also enclosed for you to review and then sign as a condition of employment are the Conflict of Interest Agreement, the Acknowledgement of At-Will Employment, and our Arbitration Agreement, which provides that all disputes arising out of your employment must be resolved through binding arbitration." (*Id.*)

The Arbitration Agreement is a two-and-a-half-page document consisting of single-space text. (Ex. 3 to Pompliano Decl.) It is apparently a preprinted contract: neither Pompliano nor Snapchat are referred to by

name; instead, the parties are referred to exclusively as "Employee" and "Company." (*See generally id.*)

The Arbitration Agreement contains a general provision stating that all claims "relating in any manner to Employee's hiring, employment, or termination of employment" will be submitted to final and binding arbitration. (Ex. 3 to Pompliano Decl. at p 1.) However, under a section titled "Covered Claims," the Arbitration Agreement specifically describes claims that are subject to the agreement as those "arising under" specific theories of liability, all of which apply to claims by an employee:

> breach of contract[3], wrongful termination, negligence. defamation, infliction of emotional distress, misrepresentation, personal injury, public policy, tort, data privacy, wage and hour claims, violations of Title VII of the Civil Rights Act of 1964, as amended, the Americans with Disabilities Act, the Age Discrimination in Employment Act, the Older Workers Benefit Protection Act, the Worker Adjustment and Retraining Notification Act, the Family and Medical Leave Act, the California Fair Employment and Housing Act, the Fair Labor Standards Act, the California Family Rights Act, the California Labor Code, other California wage and hour laws…

(*Id.*) Although that section purports that "disputes the Company may have with the Employee" are within its ambit, the agreement provides no examples of claims Company may have against Employee. (*Id.*)

The agreement also provides: "Nothing in this Arbitration Agreement will prevent either party from seeking a preliminary injunction (or

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[3] As set forth below, any breach-of-contract claims brought by defendants against Pompliano relating to the Assignment Agreement would not be subject to the Arbitration Agreement. (*See infra* at pp. 8–9.)

other provisional remedy) in court to preserve the status quo before the arbitrator issues his/her award." (Ex. 3 to Pompliano Decl. at p. 1.)

The Arbitration Agreement contains a delegation clause, which provides that "disagreements over the arbitrability of any claim, controversy, or dispute or the arbitrator's jurisdiction, including any objections to the existence, scope, or validity of this Arbitration Agreement, will be resolved by the arbitrator." (Ex. 3 to Pompliano Decl. at p. 1.) However, the Arbitration Agreement also provides: "If any provision of this Arbitration Agreement is adjudged to be void or otherwise unenforceable, in whole or in part, such adjudication will not affect the validity of the remainder of the Arbitration Agreement which will remain in full force and effect." (*Id.* at pp. 2–3.)

The Arbitration Agreement further provides that signing of the agreement is "a condition of Employee's employment with the Company…" (Ex. 3 to Pompliano Decl. at p. 1.) The Arbitration Agreement contains no provision allowing Pompliano to opt out of the delegation clause or, more generally, to opt out of the obligation to arbitrate his claims against Snapchat. (*See generally id.*)

By contrast, the Assignment Agreement gives defendants the right to sue Pompliano in court. Specifically, it provides that Pompliano consents to personal jurisdiction in state or federal court for "any lawsuit filed [in court] against [him] by Company arising from or related to this Agreement." (Ex. 2 to Pompliano Decl. § 7.1 [p. 3].) The claims defendants may pursue against Pompliano include breach of confidentiality (*id.* § 1 [p. 1]), enforcement of defendants' intellectual property rights (*id.* § 2 [p. 1]), restrictions on Pompliano's outside employment (*id.* § 4 [p. 2]), and return of company property (*id.* § 5 [p. 2]). The Assignment Agreement provides that defendants may seek injunctive relief to prevent Pompliano

from breaching the Assignment Agreement. (*Id.* § 7.6 [p. 3].) The same section, however, also provides that "[t]he rights and remedies provided to each party in this Agreement are cumulative and in addition to any other rights and remedies available to such party at law or in equity." (*Id.*) Accordingly, pursuant to the Assignment Agreement, defendants have a right to pursue any claims they may have against Pompliano under the Assignment Agreement in state and federal court. Moreover, the Assignment Agreement does not contain its own arbitration provision or incorporate the Arbitration Agreement. (*See generally id.*; *see also id.* § 7.10 [p. 3] ("This Agreement is the final, complete and exclusive agreement of the parties with respect to the subject matter hereof and supersedes and merges all prior communications between us with respect to such matters.").)

After sending these agreements to Pompliano, Khan and Snap Inc.'s in-house recruiter told Pompliano it was very important that he sign and return the documents the same day. Accordingly, he was given no meaningful opportunity to consult with an attorney, or to negotiate the terms of the agreements. He electronically signed and returned the three documents that day, as instructed. (Pompliano Decl. ¶¶ 14–15.)

Pompliano started working at Snapchat on August 31, 2015. Three weeks later, on September 18, 2015, Pompliano Snapchat terminated his employment because he refused to participate in Snapchat's misrepresentations to its employees, investors, trading partners, advertisers, and the media, regarding its user and engagement metrics, and his insistence that Snapchat correct these metrics before becoming a public company.

(Compl. [Dkt #1])[4]

IV. LEGAL STANDARD

Under the Federal Arbitration Act ("FAA"), 9 U.S.C. §§ 1–16, if an arbitration clause is not itself invalid under "generally applicable contract defenses, such as fraud, duress, or unconscionability," *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 339 (2011) (quoting *Doctor's Assocs., Inc. v. Casarotto*, 517 U.S. 681, 687 (1996)) (quotation marks omitted) (citing *Perry v. Thomas*, 482 U.S. 483, 492–93 n. 9 (1987)), it must be enforced according to its terms, *id.* (citing *Volt Info. Scis., Inc. v. Bd. of Trs. of Leland Stanford Junior Univ.*, 489 U.S. 468, 478 (1989)). Thus, this Court's role under the FAA is "limited to determining (1) whether a valid agreement to arbitrate exists and, if it does, (2) whether the agreement encompasses the dispute at issue." *Kilgore v. KeyBank, Nat'l Ass'n*, 673 F.3d 947, 955 (9th Cir. 2012) (quoting *Chiron Corp. v. Ortho Diagnostic Sys., Inc.*, 207 F.3d 1126, 1130 (9th Cir. 2000) (quotation mark omitted)).

"When evaluating a motion to compel arbitration, courts treat the facts as they would when ruling on a motion for summary judgment, construing all facts and reasonable inferences that can be drawn from those

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[4] Although defendants assert that Pompliano was terminated for "poor performance" (Mot. at p. 8), defendants offer no support for this assertion, no declaration attesting to this purported reason for Pompliano's termination, and no substantiation of how—a mere three weeks into his employment with Snap Inc.—Pompliano's performance at Snapchat was determined to be anything less than stellar. The fact that there was no warning, no performance improvement plan, and no justification given for Pompliano's termination by itself substantiates Pompliano's claim that he was fired for blowing the whistle on Snapchat's dissemination of false user and engagement metrics and his refusal to participate in Snapchat's fraud upon the public.

facts in a light most favorable to the non-moving party." *Chavez v. Bank of Am.*, Case No. C 10–653 JCS, 2011 WL 4712204, at *3 (N.D. Cal. Oct. 7, 2011) (citing *Perez v. Maid Brigade, Inc.*, Case No. C 07–3473 SI, 2007 WL 2990368, at *3 (N.D. Cal. Oct. 11, 2007)).

V. ARGUMENT

A. The Delegation Clause Is Unenforceable Because It Is Ambiguous and Unconscionable

Defendants argue that the "gateway" issue here, i.e., arbitrability of Pompliano's claims, must be determined by the arbitrator under the Arbitration Agreement's delegation clause. (Mot. at pp. 14–16.) That clause, however, is both ambiguous and unconscionable, and thus unenforceable.

"[P]arties can agree to arbitrate 'gateway' questions of 'arbitrability,' such as whether the parties have agreed to arbitrate or whether their agreement covers a particular controversy." *Rent–A–Center, West, Inc. v. Jackson*, 561 U.S. 63, 68–69 (2010). While the Court generally resolves ambiguities in arbitration agreements in favor of arbitration, it resolves ambiguities as to the delegation of arbitrability in favor of court adjudication. *First Options of Chi., Inc. v. Kaplan*, 514 U.S. 938, 944–45 (1995); *see also Momot v. Mastro*, 652 F.3d 982, 987–88 (9th Cir. 2011) ("Because such issues would otherwise fall within the province of judicial review, we apply a more rigorous standard in determining whether the parties have agreed to arbitrate the question of arbitrability."); *see also Oracle Am., Inc. v. Myriad Grp., A.G.*, 724 F.3d 1069, 1072 (9th Cir. 2013) ("the federal policy in favor of arbitration does not extend to deciding questions of arbitrability."). Accordingly, courts should presume that they determine arbitrability absent "clea[r] and umistakabl[e] evidence" that the parties agreed to delegate that question to an arbitrator. *Howsam v. Dean Witter Reynolds, Inc.*, 537 U.S. 79, 83 (2002); *First Options*, 514 U.S. at

939. Such clear and unmistakable evidence can include a "course of conduct demonstrating assent … or … an express agreement." *Momot*, 652 F.3d at 988.[5]

Here, defendants do not point to any evidence of a course of conduct demonstrating assent, but instead rely solely on the text of the delegation clause in the Arbitration Agreement. (Mot. at p. 15.) Although the delegation clause may be clear and unmistakable when read in isolation, in context it is both ambiguous and unconscionable.

1. There Is No Clear and Unmistakable Evidence the Parties Agreed to the Delegation Clause

"Even broad arbitration clauses that expressly delegate the enforceability decision to arbitrators may not meet the clear and unmistakable test, where other language in the agreement creates an uncertainty in that regard." *Vargas v. Delivery Outsourcing, LLC*, Case No. 15–cv–03408–JST, 2016 WL 946112, at *6 (N.D. Cal. Mar. 14, 2016) (quoting *Ajamian v. CantorCO2e, L.P.*, 203 Cal. App. 4th 771, 792 (2012)). This is so because "[a]s a general matter, where one contractual provision indicates that the enforceability of an arbitration provision is to be decided

[5] Relying on a case from the Federal Circuit, defendants ask the Court to apply the "wholly groundless" standard; i.e., in the event the Court determines there is not clear and unmistakable evidence the parties agreed to the delegation clause, a second inquiry is whether the assertion of arbitrability is "wholly groundless." (Mot. at p. 16 (citing *Qualcomm, Inc. v. Nokia Corp.*, 466 F.3d 1366, 1373 n.5 (Fed. Cir. 2006)).) However, "Ninth Circuit law has not explicitly required this second step, and many courts have not applied it in their analysis." *Mikhak v. University of Phoenix*, Case No. C16–00901–CRB, 2016 WL 3401763, at *3 n.1 (N.D. Cal. Jun. 21, 2016) (citations omitted). In any event, as set forth below, defendants' assertion of arbitrability is wholly groundless as the delegation clause (and the Arbitration Agreement as a whole) is ambiguous and unconscionable.

by the arbitrator, but another provision indicates that the court might also find provisions in the contract unenforceable, there is not clear and unmistakable delegation of authority to the arbitrator." *Id.* (emphasis in original) (citing *Parada v. Superior Court*, 176 Cal. App. 4th 1554, 1565–66 (2009)); *see also Parada*, 176 Cal. App. 4th at 1565–66 (finding no clear and unmistakable delegation where the contract included a severability provision applicable "[i]n the event that any provision of this Agreement shall be determined by a trier of fact of competent jurisdiction to be unenforceable.").

The delegation clause here is ambiguous and uncertain. Although the delegation clause purports to say that all questions of arbitrability must be decided by an arbitrator, the Arbitration Agreement excludes from its ambit any request for a "preliminary injunction (or other provisional remedy) in court to preserve the status quo before the arbitrator issues his/her award." (Ex. 3 to Pompliano Decl. at p. 1.) Furthermore, the Arbitration Agreement provides for the possibility that "provision[s] of this Arbitration Agreement [may be] *adjudged* to be void or otherwise unenforceable, in whole or in part…" (*Id.* at p. 2 [emphasis added].) The right to seek an injunction in court, and the fact that the Arbitration Agreement may be adjudged to be void or enforceable, implies that a court may determine arbitrability. That implication, however, contradicts the broad delegation clause purporting to reserve that decision to an arbitrator.[6]

[6] It is anticipated that defendants will argue that the provision allowing the parties to seek a preliminary injunction in court refers solely to enforcement of the Arbitration Agreement. But that provision is not limited by its terms to requests for injunctive relief relating to the Arbitration Agreement. (Ex. 3 at p. 1.)

Moreover, the Assignment Agreement is in conflict with the delegation clause of the Arbitration Agreement because the Assignment Agreement gives Snap Inc. the right to pursue any claims "arising from or related to [the Assignment Agreement]" in court. (Ex. 2 to Pompliano Decl. § 7.1 (p. 3); *see also id.* § 7.10 [p. 3] (Assignment Agreement is "the final, complete and exclusive agreement of the parties with respect to the subject matter hereof…").)[7] This provision is inconsistent with the provision in the Arbitration Agreement that "disagreements over the arbitrability of any claim, controversy, or dispute or the arbitrator's jurisdiction, including any objections to the existence, scope, or validity of this Arbitration Agreement, will be resolved by the arbitrator" (Ex. 3 to Pompliano Decl. at p. 1) because it reserves to the courts the issue of arbitrability with respect to certain claims rather than delegating determination of arbitrability of those claims to an arbitrator.

Accordingly, when read in conjunction with the Assignment Agreement, the delegation clause of the Arbitration Agreement is ambiguous as to whether the parties intended to have an arbitrator decide the arbitrability of: (a) all claims; (b) all claims, save those for injunctive relief; (c) all claims, save those for injunctive relief regarding arbitration; (d) only Pompliano's claims; (e) only Pompliano's claims, save those for injunctive relief; or (f) only Pompliano's claims, save those for injunctive relief relating to enforcement of the Arbitration Agreement. Thus, the

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[7] All three documents signed Pompliano as a condition of employment on August 14, 2015, should be read together as a single agreement. *See In re Lumbermans Mortg. Co.*, 712 F.2d 1334, 1336 (9th Cir. 1983) (finding that three related agreements entered into on the same date must be read as one agreement; "Several contracts relating to the same matters, between the same parties, and made as parts of substantially one transaction, are to be taken together.") (quoting Cal. Civ. Code § 1642).

delegation clause is uncertain and there is no clear and unmistakable evidence that the parties agreed to delegate the issue of arbitrability to an arbitrator.

2. The Delegation Clause Is Unenforceable Because It Is Unconscionable

"Under California law, a contractual provision is unenforceable if it is both procedurally and substantively unconscionable." *Kilgore*, 718 F.3d at 1058 (citing *Armendariz Found. Health Psychcare Servs., Inc.*, 24 Cal.4th 83, 114 (2000)). "[T]he more substantively oppressive the contract term, the less evidence of procedural unconscionability is required to come to the conclusion that the term is unenforceable, and vice versa." *Armendariz*, 24 Cal. 4th at 114.

a. The Delegation Clause Is Procedurally Unconscionable

"Procedural unconscionability exists where a contract imposes 'oppression or surprise due to unequal bargaining power.'" *Free Range Contend, Inc. v. Google Inc.*, Case No. 14–cv–02329–BLF, 2016 WL 2902332, at *7 (N.D. Cal. May 13, 2016) (quoting *Armendariz*, 24 Cal. 4th at 114). In general, under California law, it is "procedurally unconscionable to require employees, as a condition of employment, to waive their right to seek redress of grievance in a judicial forum." *Ingle v. Circuit City Stores, Inc.*, 328 F.3d 1165, 1170 (9th Cir. 2003); *see, e.g.*, *Armendariz*, 24 Cal.4th at 114-15 (explaining an arbitration agreement was procedurally unconscionable because it was imposed on employees as a condition of employment, and there was no opportunity for them to negotiate); *see also Aral v. Earthlink, Inc.*, 134 Cal. App. 4th 544, 557 (2005) (an arbitration clause on a "take it or leave it" basis demonstrates "quintessential procedural unconscionability"); *Flores v. Transamerica HomeFirst, Inc.*, 93 Cal. App.

4th 846, 853 (2001) ("A finding of a contract of adhesion is essentially a finding of procedural unconscionability").

Here, the Arbitration Agreement is a quintessential contract of adhesion. The agreement was "being signed as a condition of Employee's employment with the Company and as a separate agreement between the Company…" (Ex. 3 to Pompliano Decl. at p. 1). (*See also* Ex. 1 to Pompliano Decl. at p. 2 (stating that Pompliano was required to sign the Arbitration Agreement and Assignment Agreement as a "condition of employment").) Furthermore, Snap Inc.'s in-house recruiter and its Chief Strategy Officer told Pompliano that he needed to sign the Arbitration Agreement as a condition of his employment—on the same day he received it. (Pompliano Decl. ¶ 14.) Pompliano was given no meaningful opportunity to consult with an attorney or negotiate the terms of the agreements. (*Id.* ¶ 16.) Accordingly, the delegation clause is procedurally unconscionable. *See also Vargas*, 2016 WL 946112, at *9 (finding a delegation clause procedurally unconscionable in part because it was a preprinted, standardized contract, drafted entirely by the employer, and the employee had little opportunity or power to review or negotiate the contract).

Defendants may argue that Pompliano, who had started several small businesses while in college and shortly thereafter, was a sophisticated party who should have understood the legal intricacies of the delegation clause. However, Pompliano is not a lawyer. He holds no professional licenses or advanced degrees. He had no experience negotiating written employment or arbitration agreements. And he had no understanding that he was signing away his right to have a court determine the issue of arbitrability, or the implications of delegating that decision to an arbitrator (nor would it be reasonable for him to have such an understanding as a lay person). (Pompliano Decl. ¶¶ 3, 4, 16.) *See Attia v.*

Neiman Marcus Group, Inc., Case No. SACV 16–0504–DOC, 2016 WL 8902584, at *6 (C.D. Cal. Jun. 27, 2016) (finding that a delegation clause was procedurally unconscionable, in part, because it was presented on a take-it-or-leave-it basis, and because "'the issue of delegating arbitrability questions to an arbitrator is a rather arcane issue upon which parties likely do not focus.'") (quoting *Pinela v. Neiman Marcus Group, Inc.*, 238 Cal. App. 4th 227, 243 (2015)); *Mikhak v. University of Phoenix*, Case No. C16–00901–CRB, 2016 WL 3401763, at *5 (N.D. Cal. Jun. 21, 2016) (finding that the plaintiff, a former researcher and professor of Biostatistics and Genetic and Molecular Epidemiology was not sufficiently "sophisticated" to comprehend the legal intricacies of a delegation clause and reserving for the court the determination of whether the plaintiff's claims were arbitrable). Moreover, Pompliano's purported sophistication alone would not be enough to negate a showing of procedural unconscionability. *See Nagrampa v., MailCoups, Inc.*, 469 F.3d 1257, 1283 (9th Cir. 2006) (*en banc*) ("[T]he sophistication of a party, alone, cannot defeat a procedural unconscionability claim."). Accordingly, the delegation clause is procedurally unconscionable.

b. The Delegation Clause Is Substantively Unconscionable

"Substantive unconscionability addresses the fairness of the term in dispute." *Pokorny v. Quixtar, Inc.*, 601 F.3d 987, 997 (9th Cir. 2010) (quoting *Szetela v. Discover Bank*, 97 Cal. App. 4th 1094, 1100 (2002)) (internal quotation marks omitted). It arises when an agreement "imposes unduly harsh, oppressive, or one-sided terms," *Ajamian*, 203 Cal. App. 4th at 797, or "reallocates risks in an objectively unreasonable or unexpected manner." *Morris v. Redwood Empire Bancorp*, 128 Cal. App. 4th 1305, 1317 (2005) (quoting *Jones v. Wells Fargo Bank*, 112 Cal. App. 4th 1527,

1539 (2003)) (internal quotation mark omitted). The paramount consideration in assessing substantive unconscionability is mutuality. *Pokorny*, 601 F.3d at 997 (quoting *Abramson v. Juniper Networks, Inc.*, 115 Cal. App. 4th 638, 657 (2004)) (internal quotation marks omitted). Agreements to arbitrate will be substantively unconscionable if they do not contain at least "a modicum of bilaterality." *Id.* at 998. (quoting *Abramson*, 115 Cal. App. 4th at 657) (internal quotation marks omitted).

In addition, a provision in an adhesion contract that does not fall within the reasonable expectations of the weaker or "adhering" party is substantively unconscionable and will not be enforced against him. *Thompson v. Toll Dublin, LLC*, 165 Cal. App. 4th 1360, 1372–73 (2008) (citing *Armendariz*, 24 Cal.4th at 113); *see also Parada*, 176 Cal. App. 4th at 1573 ("Substantive unconscionability may be shown if the disputed contract provision falls outside the nondrafting party's reasonable expectations.") (citing *Gutierrez v. Autowest, Inc.*, 114 Cal. App. 4th 77, 88 (2002)).

Given the delegation clause's high degree of procedural unconscionability, Pompliano is only required to make a minimal showing of its substantive unconscionability to render it unenforceable. *Lima v. Gateway, Inc.*, 886 F. Supp. 2d 1170, 1183 (C.D. Cal. Aug. 7, 2012) (Gee, J.) (citing *Mercuro v. Superior Court*, 96 Cal. App. 4th 167, 175 (2002)).

Here, the delegation clause is substantively unconscionable because it purports to delegate the issue of arbitrability to the arbitrator with respect to Pompliano's claims against defendants, but allows arbitrability of defendants' claims against Pompliano to be determined by the courts. The arbitrability of all of Pompliano's claims, including a specific litany of claims typically brought by an employee against an employer, is to be decided by an arbitrator. (Ex. 3 to Pompliano Decl. at p. 1.) By contrast,

arbitrability of defendants' claims against Pompliano relating to the Assignment Agreement (which include typical claims by an employer, including theft of trade secrets, breach of confidentiality, and infringement of Snap Inc.'s intellectual property rights) is exempt from the delegation clause of the Arbitration Agreement. (Ex. 2 to Pompliano Decl. § 7.1 [p. 3].) This disparity is harsh, oppressive, and one-sided in of a multi-billion-dollar company and its officers against an individual employee, and beyond the reasonable expectations of an employee (Pompliano Decl. ¶ 16), making the delegation clause substantively unconscionable.

Defendants' reliance on *Momot v. Mastro*, 652 F.3d 982 (9th Cir. 2011), and *Mohamed v. Uber Technologies, Inc.*, 848 F.3d 1201 (9th Cir. 2016), is misplaced. There was no argument by the plaintiff in *Momot* that the delegation clause in that case was unenforceable. 652 F.3d at 986–88. The *Mohamed* case did involve an argument by the plaintiffs that the delegation clauses of the relevant arbitration agreements were unenforceable. But there, the delegation clauses included provisions that allowed the plaintiffs to opt out of the arbitration agreements within 30 days of signing. 848 F.3d at 1211. Here, the Arbitration Agreement contains no opt-out provision. (*See generally* Ex. 3 to Pompliano Decl.) Accordingly, the delegation clause is harsh, oppressive, and one-sided in defendants' favor, and therefore substantively unconscionable.

B. The Arbitration Agreement as a Whole Is Unenforceable Because It Is Unconscionable

1. The Arbitration Agreement as a Whole Is Procedurally Unconscionable

As set forth above, the relative sophistication of the parties, the fact that the Arbitration Agreement was an agreement of adhesion and a condition of Pompliano's employment, and the limited time (less than one

day) that Pompliano was given to review the agreement, precluding the possibility of negotiation or the opportunity to consult with an attorney (Pompliano Decl. ¶¶ 14–16), renders the delegation clause procedurally unconscionable. For the same reasons, the Arbitration Agreement as a whole is also procedurally unconscionable.

2. The Arbitration Agreement as a Whole Is Substantively Unconscionable

In conjunction with the Assignment Agreement, the Arbitration Agreement limits Pompliano to arbitration for virtually every conceivable claim an employee might bring against an employee. (Ex. 3 to Pompliano Decl. at p. 1.) None of the claims specifically-enumerated in the Arbitration Agreement would ordinarily be brought by an employer against an employee. On the other hand, virtually every claim that an employer typically brings against an employee (for example, theft of trade secrets, breach of confidentiality, and those relating to Snap Inc.'s intellectual property rights) are not only omitted from the claims listed in the Arbitration Agreement, the Assignment Agreement affirmatively allows defendants to pursue those claims in state or federal court against Pompliano. (Ex. 2 to Pompliano Decl. § 7.1 [p. 3]; *see also id.* §§ 1 ("Confidential Information Protections"), 1.1 ("Nondisclosure; Recognition of Company's Rights"), 1.2 ("Confidential Information") 2 ("Inventions"), 4 (restricting outside employment), 5 ("Return of Company Property").) Because the parties' agreement requires Pompliano to arbitrate all of his claims against defendants but allows defendants access to the courts for their claims against Pompliano, the Arbitration Agreement is substantively unconscionable. *See Nagrampa*, 469 F.3d at 1285 ("Where the party with stronger bargaining power has restricted the weaker party to the arbitral forum, but reserved for itself the ability to seek redress in either

an arbitral or judicial forum, California courts have found a lack of mutuality supporting substantive unconscionability."); *Armendariz*, 24 Cal.4th at 119 ("an agreement requiring arbitration only for the claims of the weaker party but a choice of forums for the claims of the stronger party" is substantively unconscionable).

C. Pompliano's Claim for Violation of California Labor Code § 1050 Is Not Subject to Arbitration

Even if the Court were to find that the Arbitration Agreement is enforceable, by its terms the agreement permits Pompliano to seek "a preliminary injunction (or other provisional remedy) in court to preserve the status quo before the arbitrator issues his/her award." (Ex. 3 to Pompliano Decl. at p. 1.) Accordingly, Pompliano's ninth cause of action, which includes a request for a preliminary injunction ordering defendants to "refrain[] from making any misrepresentations to any third party concerning the facts or circumstances surrounding plaintiff's termination from Snapchat" (Compl. [Dkt #1] Prayer ¶ a) is not subject to arbitration. Defendants concede this argument by not disputing that Pompliano's Section 1050 claim is subject to the Arbitration Agreement.[8]

[8] Pompliano nevertheless reserves the right to seek leave to file a surreply should defendants belatedly address the Section 1050 claim. *See Daghlian v. DeVry Univ., Inc.*, 461 F. Supp. 2d 1121, 1143 n.37 (C.D. Cal. 2006) (noting that it is improper for a party to submit new facts or different legal arguments on reply, that a court has discretion to decline to consider new arguments made on reply, but if new arguments on reply are considered, then the opposing party must have an opportunity to respond).

D. Pompliano's Whistleblower Claims and Related Claims Are Not Subject to Arbitration

Pompliano's first cause of action for violation of the Dodd–Frank whistleblower statute and second cause of action for violation of California's whistleblower statute are not subject to the Arbitration Agreement because those claims arise under the Sarbanes–Oxley Act ("SOX"). (*See* Compl. [Dkt #1] ¶¶ 97, 100, 102, 103, 105, 112 [specifically referring to SOX].) SOX provides that "[n]o predispute arbitration agreement shall be valid or enforceable, if the agreement requires arbitration of a dispute arising under this section." 18 U.S.C. § 1514A(e)(2). Accordingly, the Arbitration Agreement is unenforceable with respect to these claims.

The court in *Wiggins v. ING U.S., Inc.*, Case No. 3:14–CV–1089, 2015 WL 3771646, at *7 (D. Conn. Jun. 17, 2015), reached the same result. There, the court denied defendant's motion to compel arbitration of plaintiff's Dodd–Frank claim, reasoning that where Dodd–Frank violations are based on violations of substantive prohibitions found in SOX, the anti-arbitration provision in 18 U.S.C. § 1514A applies to the Dodd–Frank claims. Specifically, the court reasoned that plaintiff's Dodd–Frank claim, "although enabled by § 78u-6(h)(1)(B)(i) (the provision creating the cause of action) and § 78u-6(h)(1)(A)(iii) (the provision referring to the prohibited conduct), also 'aris[es] under' § 1514A (the section that actually defines the prohibited conduct)." *Id.*

The court explained that three cases reaching the opposite result, (*Khazin v. TD Ameritrade Holding Corp.*, 773 F.3d 488, 492–93 (3rd Cir. 2014); *Ruhe v. Masimo Corp.*, Case No. SACV 11–00734–CJC, 2011 WL 4442790, at *4 (C.D. Cal. Sep. 16, 2011); *Murray v. UBS Sec., LLC*, Case No. 12 Civ. 5914, 2014 WL 285093, at *10–11 (S.D.N.Y. Jan. 27, 2014), the same cases upon which defendants rely (Mot. at p. 14)) "oversimplify"

relevant case law. *Wiggins*, 2015 WL 3771646 at *6. Those cases reason that a "cause of action" only "arises under" the statute that creates it, and that since Section 78u-6 creates the Dodd–Frank claim, the Dodd–Frank claim does not "aris[e] under" Section 1514A. Accordingly, these cases conclude that § 1514A(e)(2) is inapplicable to whistleblower claims brought under Dodd–Frank. This reasoning ignores Supreme Court precedent, which provides that "a cause of action not only 'arises under' the provision literally explicitly stating that a private right of action exists … but also under any law that 'provides a necessary element of the plaintiff's claim for relief.'" *Wiggins*, 2015 WL 3771646 at *6 (quoting, *Jones v. R.R. Donnelly & Sons, Co.*, 541 U.S. 369, 376 (2004)). As the Supreme Court noted, "[n]othing in our case law supports an interpretation [of 'arising under'] … under which [the phrase] means something akin to 'based solely upon.'" *Id.* (quoting, *Jones*, 541 U.S. at 383.).

Moreover, all claims that are factually intertwined with the whistleblower claims (i.e., all causes of action), should be heard in court. In *Stewart v. Doral Financial Corp.*, 997 F.Supp.2d. 129 (D. Puerto Rico 2014), the court concluded that a mandatory arbitration agreement was invalid and unenforceable as to plaintiff's breach of contract claims where the claims were "entangled with" and "arose from the same nucleus of operative facts" as a claim arising under SOX. *Id.* at 139. The court reasoned that compelling arbitration would require both sides to relitigate the application of SOX's whistleblower provision in order to determine whether defendant did, in fact, breach its contractual obligations and that this "would not only frustrate the purpose of 18 U.S.C. § 1514A(e)(2) but would also place a substantial financial and temporal burden on all parties involved." *Id.* at 139–40. Here, too, compelling arbitration of any of Pompliano's claims, which are all intertwined factually (as defendants

concede [Mot. at pp. 10–11, 13 n.2]), would frustrate the purpose of 18 U.S.C. § 1514A(e)(2) and place undue burdens on the parties.

Defendants argue that Pompliano's second cause of action for violation of California Labor Code § 1102.5 should be subject to arbitration because courts purportedly "have routinely granted arbitration of Labor Code Section 1102.5 claims…" (Mot. at p. 14.) However, those cases are distinguishable. Unlike here, the plaintiff in *Elmore v. CVS Pharmacy, Inc.*, Case. No. 2:16–cv–05603, 2016 WL 6635625 (C.D. Cal. Nov. 9, 2016), did not argue that the delegation clause was unenforceable. The court in *Jacovides v. Future Foam, Inc.*, Case No. 2:16–cv–01842, 2016 U.S. Dist. LEXIS 57530 (C.D. Cal. Apr. 25, 2016), found that the arbitration agreement at issue was mutual. Similarly, in *Totten v. Kellogg Brown & Root, LLC*, 152 F. Supp. 3d 1243 (C.D. Cal. 2016) (Gee, J.), the Court found that the arbitration agreement was procedurally unconscionable, but the agreement was not substantively unconscionable because, unlike here, the requirement to arbitrate was mutual. *Id.* at 1252. Furthermore, the issue of whether the § 1102.5 arose under SOX was not raised. *See generally id.* Accordingly, defendants' authorities are inapposite.

E. Equitable Estoppel Does Not Apply Here

Defendants argue that Pompliano is equitably estopped from contesting the arbitrability of his claims because he purportedly received "the benefits of [the Arbitration Agreement] while simultaneously attempting to avoid the burdens that contract imposes." (Mot. at p. 12 [quoting *Alliance Bank of Ariz. V. Patel*, Case No. CV 13–736, 2013 WL 2432313 (C.D. Cal. Jun. 3, 2013)].) However, *Patel* merely stands for the proposition that a plaintiff who asserts claims under a contract is bound by a valid and enforceable arbitration provision in the same agreement. Unlike here, enforceability of the arbitration agreement was not at issue

in *Patel*. 2013 WL 2432313, at *3. Moreover, defendants cite no authority (and Pompliano is not aware of any) holding that a party is equitably estopped from pursuing claims in court after asserting those claims in arbitration, especially where, as here, there has been no discovery or substantive proceedings in arbitration. (Sergenian Decl. ¶¶ 4, 5, 9; Ex. B, C, H, I.)[9] In addition, three of the claims in this action (the first, second, and ninth causes of action) were never asserted in arbitration. Equitable estoppel, therefore, has no application here.

VI. CONCLUSION

For the foregoing reasons, plaintiff Anthony Pompliano respectfully requests that the Court deny defendants' motion to compel arbitration.

Dated: June 23, 2017

Respectfully submitted,
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[9] As stated above, Pompliano voluntarily dismissed the state court action after filing this action. (Sergenian Decl. ¶ 12; Ex. J.) However, there does not appear to be a similar mechanism in arbitration that would allow Pompliano to dismiss the arbitration without prejudice. Accordingly, Pompliano is maintaining the arbitration solely as a prophylactic measure in the event the Court compels arbitration.